

NO. _____

In the Supreme Court of Texas

IN RE STEVEN HOTZE, M.D., HON. ALLEN WEST, REPUBLICAN PARTY OF TEXAS, HON. SID MILLER, HON. MARK HENRY, HON. CHARLES PERRY, HON. DONNA CAMPBELL, HON. PAT FALLON, HON. BILL ZEDLER, HON. CECIL BELL, JR., HON. STEVE TOTH, HON. DAN FLYNN, HON. MATT RINALDI, HON. RICK GREEN, HON. MOLLY WHITE, HARRIS COUNTY REPUBLICAN PARTY/HON. KEITH NIELSON, HON. BRYAN SLATON, HON. ROBIN ARMSTRONG, M.D., JIM GRAHAM, HON. CATHIE ADAMS, HON. JOANN FLEMING, JULIE MCCARTY, SHARON HEMPHILL, AND AL HARTMAN,
Relators,

On Petition for Writ of Mandamus to the Secretary of State

PETITION FOR WRIT OF MANDAMUS

JARED WOODFILL
Woodfill Law Firm, P.C.
State Bar No. 00788715
3 Riverway, Ste. 750
Houston, Texas 77056
(713) 751-3080 (Telephone)
(713) 751-3058 (Facsimile)
woodfillservice@gmail.com

Counsel for Relators

Identity of Parties and Counsel

1. Relators

Steven F. Hotze, MD
20214 Braidwood Drive
Katy, Texas 77450 (Harris County)

Dr. Hotze is a registered voter in Harris County and will be voting in the general election.

Hon. Allen West, Chairman, Republican Party of Texas, Lieutenant Colonel (Ret)
1837 Eastern Mills Dr.
Garland, Texas 75043

Chairman Allen West is the duly elected Chairman of the Republican Party of Texas.

Republican Party of Texas
211 E 7th St #915
Austin, Texas 78701

The Republican Party of Texas is a political party established under the Texas Election Code.

Hon. Sid Miller
Texas Agricultural Commissioner
6407 Hwy 377
Stephenville, Texas 76401

Commissioner Miller is the 12th Commissioner of the Texas Department of Agriculture.

Hon. Mark Henry
County Judge, Galveston County, Texas
1524 Coronado Lakes Dr.
League City, Texas 77573

Judge Henry is the elected County Judge for Galveston County.

Hon. Charles Perry
36 West Beauregard #510
San Angelo, Texas 76903

Senator Perry is a member of the Texas Senate, representing District 28.

Hon. Donna Campbell
1319 Mary's Cove
New Braunfels, Texas 78130

Senator Campbell is a member of the Texas Senate, representing District 25.

Hon. Pat Fallon
9800 Center Parkway, #200
Dallas, Texas 75034

Senator Fallon is a member of the Texas Senate, representing District 30.

Hon. Bill Zedler
5840 West Interstate 20 Suite #110
Arlington, TX 76017
817-483-1885 Phone
817-478-1887 Fax

State Representative Zedler is a member of the Texas House of Representative, representing District 96.

Hon. Cecil Bell Jr.
30421 Old Hockley Rd.
Magnolia, Texas 75034

State Representative Bell is a member of the Texas House of Representatives, representing District 3. Representative Bell is on the November 3rd, 2020 ballot.

Hon. Steve Toth
67 Chestnut Meadow Drive
Conroe, Texas 77384.

State Representative Toth is a member of the Texas House of Representatives, representing District 15. Representative Toth is on the November 3, 2020 ballot.

Hon. Dan Flynn

P.O. Box 669
Van, Texas 75790

State Representative Flynn is a member of the Texas House of Representatives, representing District 2.

Hon. Matt Rinaldi

2611 Fountain Dr.
Frisco, Texas 75034

State Representative Rinaldi is a former member of the Texas House of Representatives, representing District 115.

Hon. Rick Green

P.O. Box 900
Dripping Springs, Texas 78620

Hon. Rick Green is a former member of the Texas House of Representatives, representing District 45.

Hon. Molly White

2572 Airville Road
Temple, Texas 76501.

Hon. Molly White is a former member of the Texas House of Representatives, representing District 55.

Harris County Republican Party/Hon. Keith Nielson

2501A Central Parkway Suite A11
Houston, Texas 77092-7716
Phone: (713) 838-7900

The Harris County Republican Party is a political party established under the Texas Election Code. Hon. Keith Nielson is its elected chairman.

Hon. Bryan Slaton
1213 Cedar Cove Pl.
Royse City, TX 75189

Bryan Slaton is the Republican nominee for Texas House of Representatives District 2. Relator Bryan Slaton is on the ballot in the general election on November 3, 2020. Relator Bryan Slaton is a registered voter in Hunt County, Texas who is eligible to vote.

Hon. Robin Armstrong, M.D.
1987 Rolling Stone
Friendswood, Texas 77546

Dr. Armstrong is the Republican National Committeeman from Texas.

Jim Graham, Executive Director, Texas Right to Life
9800 Center Parkway, #200
Houston, Texas 77036

Jim Graham is the Executive Directory of Texas Right to Life, the largest pro-life organization in the country.

Hon. Cathie Adams
375 Adriatic Parkway, #1303
McKinney, Texas 75072

Hon. Cathie Adams is the former Chairperson, Republican Party of Texas.

Hon. JoAnn Fleming
13128 Timber Creek Drive
Flint, Texas 75762-9718

JoAnn Fleming is the executive director of Grassroots America-We the People and is a former Smith County Commissioner.

Julie McCarty
1972 Casa Loma Ct.
Grapevine, Texas 76051

Julie McCarty is the president of the NE Tarrant, Tea Party.

Sharon Hemphill
16419 Graven Hill Dr.
Spring, Texas 77379

Sharon Hemphill is a registered voter in Harris County. Sharon Hemphill is the Republican nominee for judge of the Texas 80th District Court, Harris County, Texas. She is on the ballot in the general election on November 3, 2020. She advanced from the Republican primary on March 3, 2020.

Al Hartman
Hartman Income REIT
2909 Hillcroft, Suite 420
Houston, Texas 77057

All Relators are registered voters in the State of Texas and intend to vote in the November 3rd, 2020 general election.

Lawyer for Relators:

Jared R. Woodfill
State Bar No. 00788715
3 Riverway, Ste. 750
Houston, Texas 77056
Tel: (713) 751-3080
Fax: (713) 751-3058
woodfillservice@gmail.com

2. Respondent

Hon. Ruth B. Hughs
Secretary of State of Texas
900 Congress, Suite 300
Austin, Texas 78751

Lawyer for Respondent Hughs:

Attorney General Ken Paxton

Office of the Texas Attorney General
P.O. Box 12548 Austin, Texas 78711-2548
Ken.Paxton@oag.texas.gov

Table of Contents

Identity of Parties and Counsel	ii
Table of Contents	vii
Index of Authorities.....	ix
Record References	xii
Statement of the Case	1
Statement of Jurisdiction	2
Issues Presented.....	5
1. Whether Respondent is violating Texas Election Code §85.001(a) by moving the early voting date from Tuesday, October 19, 2020 to Tuesday, October 13, 2020	5
2. Whether Respondent is violating Texas Election Code §86.06(a-1) by allowing “a voter to deliver a marked ballot [by mail] in person to the early voting clerk’s office prior to and including election day.”	5
Statement of Facts	6
I. On July 27, 2020, Governor Abbott Unilaterally Suspended the Texas Election Code.....	7
II. Article I §28 of the Texas Constitution Prohibits Abbott and Respondent from Suspending Laws	8
a. Abbott Responds to Harris County Clerk’s Request by Amending Election Code	8
b. Respondent Hughs is Implementing Abbott’s Unlawful Order..	9
Arguments and Authorities.....	9
I. Secretary of State Hughs is Violating the Texas Election Code	9
a. Texas Election Code Sets Early Voting Dates	

b.	The Texas Election Code establishes when a voter can deliver a marked ballot by mail in person to the early voting clerk’s office.....	11
c.	The plain language of the Texas Election Code §85.001(a) prohibits Respondent from moving the beginning of early voting up to October 13, 2020. The plain language of Texas Election Code 86.006(a-1) prohibits Respondent from extending the time a voter can deliver a marked ballot to the early voting clerk’s office	11
II.	Respondent Hughs’ Conduct and the July 27, 2020 Order Suspending the Texas Election Code are Unconstitutional	13
a.	Respondent Hughs’ conduct Violates Article I, Section 28 of the Texas Constitution	13
b.	Hughs’ Conduct violates Texas government code, Chapter 418	16
c.	Abbott’s July 27, 2020 Order Violates Article I, §19 of the Texas Constitution	16
d.	Texas Government Code, Chapter 418, Violates the Texas Constitution	17
e.	Abbott’s July 27, 2020 Order Violates the Separation of Powers Doctrine	18
f.	Abbott Refuses to Convene the Texas Legislature	20
	Prayer	23
	Certificate of Service.....	25
	TRAP 52.3(J) Certification	26
	Certificate of Compliance	27

Index of Authorities

CASES	PAGE(S)
<i>Arroyo v. State</i> , 69 S. W. 503 (Tex. Crim. App 1902)	14, 15
<i>Brown Cracker & Candy Co. v. City of Dallas</i> , 104 Tex. 290 (1911).....	14
<i>Carter v. Hamlin Hosp. Dist.</i> , 538 S.W.2d 671 (Tex. Civ. App. Eastland 1976)	19
<i>Ex parte Granviel</i> , 561 S.W.2d 503 (Tex. Crim. App. 1978).....	19, 20
<i>Ex parte Young</i> , 209 U.S. 123 (1908).....	10
<i>Fin. Comm’n of Texas v. Norwood</i> , 418 S.W.3d 556 (tex. 2013)	19
<i>Gov’t Servs. Ins. Underwriters v. Jones</i> , 368 S.W.2d 560 (Tex. 1963)	19
<i>Hunter v. City of Pittsburgh</i> , 207 U.S. 161 (1907).....	19
<i>In re Abbott</i> , No 20-0291, 2020 WL 1943226 (Tex. Apr. 23, 2020)	13, 14
<i>In re Carlisle</i> , 209 S.W.3d 93 (Tex.2006)	4
<i>In re Hotze</i> , 2020 Tex. Lexis 680 (July 17, 2020)	5, 21, 22
<i>In re M.N.</i> , 262 S.W.3d 799 (Tex. 2008)	12
<i>In re Salon A La Mode et al</i> , No. 20-0340 (concurring opinion, J. Blacklock)(Tex. May 5, 2020)	13
<i>In re Tex. Senate</i> , 36 S.W.3d 119 (Tex. 2000)	4
<i>In re Woodfill</i> , 470 S.W.3d 473 (Tex. 2015).....	4
<i>Jones v. State</i> , 803 S.W.2d 712 (Tex. Crim. App. 1991)	19
<i>Leland v. Brandal</i> , 257 S.W.3d 204 (Tex.2008).....	12
<i>Mosley v. Tex. Health & Human Servs. Comm’n</i> , 593 S.W.3d 250 (Tex. 2019)	17

<i>OCA-Greater Houston v. Texas</i> , 867 F.3d 604 (5 th Cir. 2017).....	10
<i>Perry v. Del Rio</i> , 67 S.W.3d 85 (tex. 2001).....	18
<i>Sears v. Bayoud</i> , 786 S.W.2d 248 (Tex. 1990)	4
<i>State v. Rhine</i> , 297 S.W. 3d 301 (Tex. Crim. App. 2009)	19, 20
<i>Tex. Boll Weevil Eradication Found., Inc.</i> , 952 S.W.2d 454 (Tex. 1997)	19

Constitutional Provisions, Statutes, and Rules:

Tex. Const., art. I ,§28	15, 17
Tex. Const., art. II §1	15, 17, 18
Tex. Const., art. IV, §8.....	21
Tex. Elec. Code Ann §1.002(a)	9
Tex. Elec. Code § 31.003	10
Tex. Elec. Code §41.001(a)(3)	10
Tex. Elec. Code §63.0101.....	11
Tex. Elec. Code §85.001	10
Tex. Elec. Code § 85.001(a)	1, 2, 5, 7, 9, 12
Tex. Elec. Code §85.001(d).....	11
Tex. Elec. Code § 86.001	1
Tex. Elec. Code § 86.006(a-1).....	1, 2, 5, 7, 8, 9, 11, 12
Tex. Elec. Code § 273.061	1, 2, 4

Tex. Gov’t Code §301.001	20
Tex. Gov’t Code § 311.011.....	12
Tex. Gov’t Code §418	15, 17, 18
Tex. Gov’t Code §418 et seq.....	16
Tex. R. App. P. 52.3	2

Other Authorities:

Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texas 140 (2012)	12
George D. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis 84 (1977).....	15

Record References

“App.” refers to the appendix to this petition.

Statement of the Case

Nature of the underlying proceeding: Pursuant to section 273.061 of the Texas Election Code [App. A], this is a petition for a writ of mandamus compelling Secretary of State Ruth Hughs to perform her statutory duties to administer early voting in person consistent with Texas Election Code §86.001 which requires “early voting by personal appearance [to] begin[] on the 17th day before election day and continue[] through the fourth day before election day....” [App. B]. This petition for writ of mandamus also seeks to compel Respondent Hughs to perform her statutory duties under Texas Election Code §86.006(a-1) and allow a voter to deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day.

Respondent: Secretary of State Ruth Hughs

Respondent’s challenged actions: Respondent intends to move early voting up by a week, October 13, 2020, despite the Texas Election Code mandate that “early voting by personal appearance begins on the 17th day before election day and continues through the fourth day before election day....”, October 19, 2020. Tex. Elect. Code § 85.001(a). Additionally, for the November 3rd, 2020 general election, Respondent intends to violate Texas Election Code §86.006 (a-1) by allowing “a voter to deliver a marked ballot [by mail] in person to the early voting clerk’s office prior to and including election day.” [App. C]

Texas Election Code §86.006(a-1) states, “The voter may deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day.” Thus, Respondents’ actions are unlawful in that she is administering the November 3, 2020 election in a manner contrary to the Texas Election Code. Because statewide voting is fast approaching, mandamus relief is necessary.

Statement of Jurisdiction

Texas Election Code §273.061 gives the Court original jurisdiction to issue a writ of mandamus “to compel the performance of any duty imposed by law in connection with the holding of an election.” The Relators have a compelling reason to request mandamus from this Court in the first instance. *See* Tex. R. App. P. 52.3. The November 3rd, 2020 general election is quickly approaching and Respondent intends to move early voting up by a week, October 13, 2020, despite the Texas Election Code mandate that “early voting by personal appearance begins on the 17th day before election day and continues through the fourth day before election day....”, October 19, 2020. Tex. Elec. Code § 85.001(a). Additionally, for the November 3rd, 2020 general election, Respondent intends to violate Texas Election Code §86.006 (a-1) by allowing “a voter to deliver a marked ballot [by mail] in person to the early voting clerk’s office prior to and including election day.” [App. C] Texas Election Code §86.006(a-1) states, “The voter may deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day.”

This Court has stated "that an election in this state is not a single event, but a *process*, and that the entire *process* is subject to contest." *Dickson v. Strickland*, 265 S.W. 1012, 1018 (Tex. 1924). Although this case does not involve an election contest, it does involve the enforcement by mandamus of duties involved with the "holding of an election," an election being the *entire process* including the date early voting begins and when a voter can deliver a marked ballot by mail in person to the early voting clerk's office. See *Grant v. Ammerman*, 437 S.W.2d 547, 548-49 (Tex. 1969)(duty to canvas results of election subject to mandamus because "canvassing of votes is a part of the election procedure and is necessary to the determination of the result."). Mandamus will lie to enforce ministerial duties arising in connection with an election. *Id.*

In this Petition for Writ of Mandamus, Relators are challenging the *process* of the election, i.e., the Respondents authority to implement and enforce changes to the Texas Election Code that have not been made by the Texas Legislature. Relators standing is not based solely on their status as voters. Relators include a County Judge who is ordered to implement the above-described changes to the Texas Election Code, members of the Texas Legislature who are tasked with creating legislation including the Texas Election Code, numerous candidates who are on the November 3rd, 2020 ballot and are impacted by Respondent's amendment to the Texas Election Code, state and local parties who have an interest in electing candidates affiliated with their respective organizations, and activist and

voters who have organized, made financial contributions, and will vote in the November 3rd, 2020 general election.

Relators ask the Court to use the power granted by the Election Code “to compel the performance of any duty imposed by law in connection with the holding of an election.” Tex. Elec. Code § 273.061. As chief election officer for the State of Texas, Respondent Hughs has been ordered to take notice of Governor Abbott’s July 27, 2020 proclamation and transmit a copy of Governor Abbott’s order to every County Judge of this state. [App. C] Respondent is further ordered to “issue all appropriate writs...and all proper proceedings will be followed to the end that said elections may be held and their results proclaimed in accordance with law.” [App. C]

When time is of the essence, this Court has not hesitated to exercise its mandamus authority. *See, e.g., In re Woodfill*, 470 S.W.3d 473, 481 (Tex. 2015) (per curiam); *In re Carlisle*, 209 S.W.3d 93, 95-96 (Tex. 2006) (per curiam); *In re Tex. Senate*, 36 S.W.3d 119, 121 (Tex. 2000); *Sears v. Bayoud*, 786 S.W.2d 248, 250 & n.1 (Tex. 1990). The Court should exercise its original mandamus authority again.

Issues Presented

1. Whether Respondent is violating Texas Election Code § 85.001(a) by moving the early voting date from Tuesday, October 19, 2020 to Tuesday, October 13, 2020.

2. Whether Respondent is violating Texas Election Code §86.006(a-1) by allowing “a voter to deliver a marked ballot [by mail] in person to the early voting clerk’s office prior to and including election day.”

Statement of Facts

“The Texas Constitution is not a document of convenient consultation. It is a steadfast, uninterrupted charter of governmental structure. Once this structure erodes, so does the promise of liberty.” *In re Hotze*, 2020 Tex. LEXIS 680) (Devine, J., concurring)

Given the extraordinary circumstances Texans have faced over the past seven (7) months, it is shocking that Governor Abbott has continued to unilaterally suspend laws while refusing to convene the Texas Legislature. When Governor Abbott first ordered the closure of restaurants, schools and businesses he deemed “nonessential,” Abbott said every option, including a special session, remained on the table. Patrick Svitek, “Ector County GOP Censures Abbott Over Executive Power Amid Coronavirus, State Sen. Charles Perry Calls for Special Session”, *Texas Tribune*, July 4, 2020. The special session has not occurred and Governor Abbott has reversed course, stating that a special session is not necessary. Taylor Goldenstein, “‘He’s decided he’s the king’: Gov. Greg Abbott’s COVID Response Leaves Lawmakers on Sidelines,” *Houston Chronicle*, September 8, 2020. Senator Charles Perry said it best: “It should not be the sole responsibility of one person to manage all the issues related to a disaster that has no end in sight.” Brandon Waltens, “Special Session? Abbott’s Mask Mandate Draws Scathing Criticism From Lawmakers”, *Texas Score Card*, July 6, 2020. Senator Perry’s position is consistent with the wisdom found in the Texas Constitution.

I. On July 27, 2020, Governor Abbott Unilaterally Suspended the Texas Election Code

On July 27, 2020, Governor Abbott issued an order suspending the Texas Election Code. [App. C] Section 85.001(a) of the Texas Election Code provides that the period for early voting by personal appearance begins 17 days before election day. Section 86.006(a-1) of the Texas Election Code states that a voter may deliver a marked mail ballot in person to the early voting clerk's office while the polls are open on election day. In his July 27, 2020 Proclamation/Order, Abbott and Respondent concluded, "[I]t has become apparent that for the November 3, 2020 elections, strict compliance with the statutory requirements in Sections 85.001(a) and 86.006(a-1) of the Texas Election Code would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster, and that providing additional time for early voting will provide Texans greater safety while voting in person...." [App. C]

In his July 27, 2020 Proclamation, Abbott ordered, "NOW, THEREFORE, I, GREG ABBOTT, Governor of Texas, under the authority vested in me by the Constitution and laws of the State of Texas, do hereby suspend Section 85.001(a) of the Texas Election Code to the extent necessary to require that, for any election ordered or authorized to occur on November 3, 2020, early voting by personal appearance shall begin on Tuesday, October 13, 2020, and shall continue through the fourth day before election day. I further suspend Section 86.006(a-1) of the

Texas Election Code, for any election ordered or authorized to occur on November 3, 2020, to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day." [App. C]

Abbott concludes by ordering "[t]he Secretary of State shall take notice of this proclamation and shall transmit a copy of this order immediately to every County Judge of this state and all appropriate writs will be issued and all proper proceedings will be followed to the end that said elections may be held and their results proclaimed in accordance with law." [App. C]

II. Article I §28 of the Texas Constitution Prohibits Abbott and Respondent from Suspending Laws

The Texas Bill of Rights, article I of the Texas Constitution, unequivocally addresses Governor Abbott's and Respondent Hughs' attempt to suspend the Texas Election Code. Specifically, article I, §28 of the Texas Constitution states, "No power of suspending laws in this State shall be exercised except by the Legislature."

a. Abbott Responds to Harris County Clerk's Request by Amending Code

On July 22, 2020, Harris County Clerk Chris Hollins asked Governor Abbott to extend the early voting period for the November 2020 general election. [App. D] Specifically, Clerk Hollins asked Abbott to "please increase Early Voting by at least one week, to begin not later than Tuesday, October 13, 2020." [App. D]

Soon thereafter, July 27, 2020, Governor Abbott unilaterally amended the Texas Election Code to extend early voting by six (6) days, October 13, 2020, and allowing a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day. [App. C]

b. Respondent Hughs is Implementing Abbott's Unlawful Order

Respondent is unlawfully forcing Relator Galveston County Judge Henry to implement Abbott's unlawful order. Specifically, in his July 27, 2020 Proclamation Abbott ordered Respondent Hughs to enforce his order stating: "The Secretary of State shall take notice of this proclamation and shall transmit a copy of this order immediately to every County Judge of this state and all appropriate writs will be issued and all proper proceedings will be followed to the end that said elections may be held and their results proclaimed in accordance with law." [App. C]

Argument and Authorities

I. Secretary of State Hughs is Violating the Texas Election Code

Respondent Ruth Hughs is the chief election officer for the State of Texas. On July 27, 2020, Governor Abbott issued a Proclamation suspending Texas Election Code sections 85.001(a) and 86.006(a-1) for the November 3rd, 2020 general election. The Abbott order applies to every election held in Texas (Texas Election Code Ann. § 1.002(a)), and as the chief election officer of the State, Hughs "is instructed by statute to 'obtain and maintain uniformity in the

application, operation, and interpretation of this code and of the election laws outside this code.’’ *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613-14 (5th Cir. 2017)(quoting Tex. Elec. Code Ann. §31.003). Here, Hughs is “threaten[ing] and [] about to commence proceedings: to enforce an invalid order” issued by Governor Abbott. *Ex parte Young*, 209 U.S. 123, 155-56 (1908).

a. Texas Election Code Sets Early Voting Dates

Texas Election Code Sec. 41.001(a)(3) provides uniform election dates:

UNIFORM ELECTION DATES.

(a) Except as otherwise provided by this subchapter, each general or special election in this state shall be held on one of the following dates:

(3) the first Tuesday after the first Monday in November.

The general election is set for November 3, 2020.

The Texas Election Code §85.001 identifies dates for early voting:

Sec. 85.001. EARLY VOTING PERIOD.

(a) The period for early voting by personal appearance begins on the 17th day before election day and continues through the fourth day before election day, except as otherwise provided by this section.

The Texas Election Code contains a provision specifically addressing the situation where it is not possible for early voting to begin on the prescribed date, stating, “If because of the date for which an election is ordered it is not possible to

begin early voting by personal appearance on the prescribed date, the early voting period shall begin on the earliest date practicable after the prescribed date as set by the authority ordering the election.” Texas Elect. Code § 85.001(d). Unlike Governor Abbott’s July 27, 2020 Order, the Texas Election Code does not move the date back, instead it sets the new date to begin early voting after the prescribed date. Here, Governor Abbott is unilaterally taking the opposite approach, extending the early voting period by almost a week.

b. The Texas Election Code establishes when a voter can deliver a marked ballot by mail in person to the early voting clerk’s office.

The Texas Election Code §86.006(a-1) states: “The voter may deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day. A voter who delivers a marked ballot in person must present an acceptable form of identification described by Section 63.0101.” The provision limits the in person delivery of a marked ballot to the early voting clerk’s office to election day. *Id.* Texas Election Code § 86.006(a-1) does not allow Respondent Hughs to amend the Texas Election Code to extend the time a voter can deliver a marked ballot to the early voting clerk’s office.

c. The plain language of Texas Election Code § 85.001(a) prohibits Respondent from moving the beginning of early voting up to October 13, 2020. The plain language of Texas Election Code §86.006(a-1) prohibits Respondent from extending the time a voter can deliver a marked ballot to the early voting clerk’s office.

Texas statutes are to be interpreted based on their plain language. *See Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008). The Court presumes the Legislature included each word for a purpose and that words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). It also presumes the Legislature understood and followed the rules of English grammar. Tex. Gov't Code § 311.011; *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 140 (2012) (describing the presumption as “unshakeable”).

The plain language of Texas Election Code §85.001(a) makes it clear that early voting can begin no earlier than the 17th day before election day. *Id.* Texas Election Code § 85.001 does not allow Respondent Hughs to move early voting beyond the 17th day before the election.

If the Legislature had wanted to give the Respondent the discretion to move the start of early voting, they could have done so. Instead, the Legislature limited the start of early voting by personal appearance to the 17th day before election day.

The plain language of Texas Election Code §86.006(a-1) limits the in person delivery of a marked ballot to the early voting clerk's office to election day. *Id.* Texas Election Code § 86.006(a-1) does not allow Respondent Hughs to amend the Texas Election Code to extend the time a voter can deliver a marked ballot to the early voting clerk's office.

If the Legislature had wanted to give the Respondent the discretion to allow a voter to deliver a marked ballot by mail in person to the early voting clerk's office prior to election day, they could have done so. Instead, the Legislature limited the in person delivery of a marked ballot to the early voting clerk's office to election day.

II. Respondent Hughs' Conduct and the July 27, 2020 Order Suspending the Texas Election Code are Unconstitutional

a. Respondent Hughs' Conduct Violates Article I, Section 28 of the Texas Constitution

“The Constitution is not suspended when the government declares a state of disaster.” *In re Abbott*, No. 20-0291, 2020 WL 1943226, at *1 (Tex. Apr. 23, 2020). “All government power in this country, no matter how well-intentioned, derives only from the state and federal constitutions.” *In re Salon A La Mode et al.*, No. 20-0340 (concurring opinion, J Blacklock) (Tex. May 5, 2020). During a pandemic “the judiciary, the other branches of government, and our fellow citizens—must insist that every action our governments take complies with the Constitution, especially now. If we tolerate unconstitutional government orders during an emergency, whether out of expediency or fear, we abandon the Constitution at the moment we need it most.” *Id.*

Any government that has made the grave decision to suspend the liberties of a free people must demonstrate that its chosen measures are absolutely necessary to combat a threat of overwhelming severity. *Id.* Before suspending freedoms

protected from infringement by the Constitution, the government is also required to demonstrate that less restrictive measures cannot adequately address the threat. *Id.* Whether it is strict scrutiny or some other rigorous form of review, courts must identify and apply a legal standard by which to judge the constitutional validity of the government's anti-virus actions.

Justice Blacklock further stated: “[W]hen constitutional rights are at stake, courts cannot automatically defer to the judgments of other branches of government. When properly called upon, the judicial branch must not shrink from its duty to require the government's anti-virus orders to comply with the Constitution and the law, no matter the circumstances.” *Id.*

Government power cannot be exercised in conflict with the constitution, even in a pandemic. *In re Abbott*, 2020 WL 1943226 at *1 (Tex. Apr. 23, 2020). Texas law does not and cannot empower a Governor to unilaterally suspend the laws of the State of Texas. Article I, § 28 of the Texas Constitution states, “No power of suspending laws in this State shall be exercised except by the Legislature.” The Texas Supreme Court has long held that the Legislature cannot delegate “to anyone else the authority to suspend a statute law of the state.” *Brown Cracker & Candy Co. v. City of Dallas*, 104 Tex. 290, 294-95 (1911); *Arroyo v. State*, 69 S.W. 503, 504 (Tex. Crim. App. 1902) (“Under the constitution, the legislature ha[s] no right to delegate its authority . . . to set aside, vacate, suspend, or repeal the general laws of this state.”).

“[P]rior to 1874 this section was as follows: ‘No power of suspending laws in this state shall be exercised, except by the legislature, *or its authority*’” (emphasis added). *Arroyo*, 69 S.W. at 504. This constitutional provision was then specifically amended to remove the provision allowing the Legislature to delegate its suspension power by “its authority.” *Id.* This was expressly done to remedy “the history of the oppressions which grew out of the suspension of laws by reason of such delegation of legislative authority and the declaration of martial law.” *Id.*

Article I, § 28 was created in part in response to then-Governor F.J. Davis “declar[ing] . . . counties under martial law” and depriving of liberty “offenders by court martial in Houston,” George D. Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 84 (1977). Texas Government Code §418 is therefore unconstitutional on its face because it purports to delegate legislative power to suspend laws to the Governor in contravention of Texas Constitution, Art. I, §28 and Art. II, §1.

As Abbott’s July 27, 2020 Order suspends several provisions of the Texas Election Code, and on its face admits that Abbott and Respondent are suspending laws in accordance with Texas Gov’t Code Chapter 418, the Order itself is an unconstitutional suspension of the laws and, therefore, violate Article I, §28 of the Texas Constitution and are “null and void.” See *Arroyo*, 69 S.W. at 504. Additionally, to the extent the Texas Disaster Act allows for the suspension of laws by the Governor, it is unconstitutional and void.

The Texas Constitution limits Abbott’s and Respondent Hughs’ authority even in times of crisis or “extraordinary occasions.” See Tex. Const. art IV, §8

(stating on “extraordinary occasions” Governor may convene the Texas Legislature). If not limited, and if Constitutional rights may be suspended or infringed, unilaterally and for unlimited duration, whenever a Governor “declares” an emergency, then such rights are wholly illusory. Governor Abbott’s July 27, 2020 Order and Respondent Hughs’ enforcement of same, violates the Texas Constitution and therefore should be declared void and unenforceable.

b. Hughs’ Conduct Violates Texas Government Code, Chapter 418

Assuming, arguendo, the Texas Disaster Act is constitutional, Hughs’ conduct and the July 27, 2020 Order violate the Texas Government Code § 418 et seq., the Texas Disaster Act. Specifically, the Disaster Act limits Governor Abbott’s power to those provisions expressly described in the statute. The Disaster Act does not contain any language expressly allowing Governor Abbott to amend the Texas Election Code.

c. Abbott’s July 27, 2020 Order Violates Article I, § 19 of the Texas Constitution

Abbott’s July 27, 2020 Order violates the due course of law provision of the Texas Constitution because it deprives Plaintiffs of their constitutionally protected rights without due course of law. Article I, § 19, entitled, “Deprivation of life, liberty, etc.; due course of law,” states:

“No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.”

Tex. Const. art. 1, § 19. Governor Abbott's actions constitute a violation and result in harm to Plaintiffs and their due process rights and Plaintiffs (1) have a liberty or property interest entitled to procedural due process protection; and (2) if so, the courts must determine which process is due. *Mosley v. Tex. Health & Human Servs. Comm'n*, 593 S.W.3d 250, 264 (Tex. 2019). Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Id.*

d. Texas Government Code, Chapter 418, Violates the Texas Constitution

Texas Government Code Chapter 418 is unconstitutional on its face and as applied. Texas Government Code Chapter 418 is unconstitutional on its face because it is an improper delegation of legislative authority expressly prohibited by Texas Constitution, Art. II, §1. Abbott's July 27, 2020 Order is facially unconstitutional because Defendant issued the Order pursuant to Chapter 418 (an unconstitutional statute) and because they purport to exercise the power to suspend laws which authority is reserved exclusively to the legislature. Tex. Const. art. I, §28. As such, Texas Government Code Chapter 418, and all orders issued pursuant thereto, should be declared unconstitutional and rendered null and void.

e. Abbott's July 27, 2020 Order Violates the Separation of Powers Doctrine

The July 27, 2020 Order Respondent Hughs is tasked with implementing/enforcing, violates the separation of powers provision of the Texas Constitution

because it suspends laws. Article II, §1 of the Texas Constitution provides that “The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.” Tex. Const. art. II, §1. The Texas Constitution vests the Legislature with “legislative power, *i.e.*, the law-making power of the people.” Tex. Const. art. 3, § 1.

Only the Legislature can exercise law-making power, subject to restrictions imposed by the constitution. Tex. Const. art. II, § 1. Because of the Texas Constitution’s “explicit prohibition against one government branch exercising a power attached to another,” *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001), exceptions to the constitutionally-mandated separation of powers may “never be implied in the least; they must be ‘expressly permitted’ by the Constitution itself.” *Fin. Comm’n of Texas v. Norwood*, 418 S.W.3d 566, 570 (Tex. 2013). These restrictions must be expressed or clearly implied. *Jones v. State*, 803 S.W.2d 712, 716 (Tex. Crim. App. 1991) (citing *Gov’t Servs. Ins. Underwriters v. Jones*, 368 S.W.2d 560, 563 (Tex. 1963)). The Legislature may enact laws that enhance the general welfare of the state and resolve political questions, such as the boundaries

of political subdivisions, subject to constitutional limits. *Carter v. Hamlin Hosp. Dist.*, 538 S.W.2d 671, 673 (Tex. Civ. App.-Eastland 1976); see *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907).

The Legislature may delegate some of its powers to another branch, but only if those powers are not more properly attached to the legislature by Constitutional mandate. For example, Legislative power cannot be delegated to the executive branch, either directly or to an executive agency. *State v. Rhine*, 297 S.W.3d 301, 306 (Tex. Crim. App. 2009). The issue becomes a question of the point at which delegation becomes unconstitutional. *Id.* The Texas Supreme Court has described the problem: "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree." *Tex. Boll Weevil Eradication Found., Inc.*, 952 S.W.2d 454, 466 (Tex. 1997).

The Texas Court of Criminal Appeals in *Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978), stated that sufficient standards are necessary to keep the degree of delegated discretion below the level of legislating. The existence of an area for exercise of discretion by the executive branch requires that standards are formulated for guidance and there is limited discretion. *Ex parte Granviel*, 561 S.W.2d at 514. The statute must be sufficiently complete to accomplish the regulation of the particular matters falling within the legislature's jurisdiction, the matters of detail that are reasonably necessary for the ultimate application, operation and enforcement of the law may be expressly delegated to the authority

charged with the administration of the statute. *Ex parte Granviel*, 561 S.W.2d at 514. Therefore, if the Legislature has not provided sufficient standards to guide the executive's discretion and the delegated power is legislative, that executive has been granted a power that is more properly attached to the legislature and the delegation is an unconstitutional violation of separation of powers. *State v. Rhine*, 297 S.W.3d 306 (Tex. Crim. App. 2019).

Texas Government Code Chapter 418 not only does not provide robust, specific standards related to delegation of legislative authority, it provides ***NO*** standards to guide Defendant's discretion when identifying penalties, including fines and incarceration.

f. Abbott Refuses to Convene the Texas Legislature

The Texas Legislature meets in regular session on the second Tuesday in January of each odd-numbered year. Tex. Gov't Code §301.001. However, Article IV, section 8, of the Texas Constitution provides: "The governor may, on extraordinary occasions, convene the Legislature at the seat of government, or at a different place in case that should be in possession of the public enemy or in case of the prevalence of disease thereat. His proclamation therefore shall state specifically the purpose for which the Legislature convened."

Our founding fathers had the wisdom to envision such a time as this. Governor Abbott decided to reject the wisdom found in the Texas Constitution and

instead abuse the Texas Disaster Act in an effort to avoid convening the Legislature during these “extraordinary occasions.” Tex. Const. art. IV, §8.

Senator Charles Perry and numerous other state legislators have called for a special session of the Texas legislature to prevent overreach by Governor Abbott on his COVID-19 response. Abbott justifies the overreach by invoking his alleged authority under the Texas Disaster Act. This Court has previously questioned that authority; however, Abbott continues to act on his own. *In re Hotze*, 2020 Tex. Lexis 680.

Just ten (10) days before Governor Abbott’s July 27, 2020 Order, this Court issued *In re Hotze* where Justice John Devine addressed the issues raised by Relators:

“I share Relators’ concern in what they describe as ‘an improper delegation of legislative authority’ to the executive branch. During declared states of ‘disaster,’ the Texas Disaster Act of 1975 bestows upon the governor the power to issue executive orders that have the ‘force and effect of law.’ Disaster or not, the Texas Constitution doesn’t appear to contemplate any circumstances in which we condone such consolidation of power. For better or worse, we have witnessed first-hand how end-running the traditional law-making process can threaten our everyday liberties. The Texas Constitution—which states that no branch of government ‘shall exercise any power properly attached to either of the others’—is not simply a suggestion.

As a result of this amalgamation of power, Texans have experienced a suspension of their rights. Suspension of law is serious business. It involves a decision that, at the very least, itself needs a constitutional blessing. In fact, the Texas Constitution speaks to this very issue. In the first article, it states, ‘No power of suspending laws in this State shall be exercised except by the Legislature.’ This provision means what it says. The judiciary may no suspend laws. Nor may the executive. Only the Legislature.”

Id.

Justice Devine’s concurring opinion in *In re Hotze* goes on to address the Texas Disaster Act’s relationship to Governor Abbott’s Covid-19 orders, stating, “Despite this clear constitutional exhortation, we review orders from the Governor that purport to be made under the Texas Disaster Act of 1975, which says that the ‘governor may suspend provisions of any regulatory statute prescribing the procedures for conduct of state business’ I find it difficult to square this statute, and the orders made under it, with the Texas Constitution.” 2020 Tex. Lexis 680 (Devine, J., concurring).

In a republic form of government with checks and balances built into our state Constitution, one person should not have the sole authority of managing a disaster with no end in sight. Taxpayers have a constitutional right to be represented. After all, it is the locally elected officials that are left to deal with the monumental outcome. How can we hold the people we put in office responsible, when they have zero responsibility in the matter? As Senator Charles Perry stated, “We need proper legislative testimony and to vet out the facts from the misinformation so that a long-term viable and transparent outcome can be achieved.” KCBD News Channel 11, “Charles Perry asking for special session to prevent ‘overreach’ during COVID-19 response”, (July 4, 2020). It is time for Governor Abbott to allow our representatives to do their job-represent us. On

Tuesday, September, 22, 2020, the State Republican Executive Committee passed a resolution, “No Exceptions, No Delays...Open Texas NOW”, calling on Governor Abbott to immediately rescind all COVID-related mandates, closures, and restrictions” and reopen the state. Brandon Waltens, “Texas GOP Urges Abbott to ‘Open Texas Now’”, *Texas Scorecard*, (September 21, 2020).

If ever a special session was justified, now is the time. Abbott’s Executive Orders are unprecedented and have had life and death implications, destroyed small businesses and family’s livelihoods, have had a crippling effect on every single community, and now have the ability to impact local, state and national elections. As long as this Court allows it to occur, one person will continue to unilaterally make these decisions under the guise of an unconstitutional statute.

Prayer

For the reasons detailed above, Relators respectfully request this Court issue a writ of mandamus ordering Respondent to perform her duties as the chief election officer for the State of Texas in accordance with the law, and not deviate from the express provisions in the Texas Election Code. Relators request this Court to order Respondent to require the first date of early voting by personal appearance to begin on the 17th day before election day. Relators further request this Court order Respondent to only allow the delivery of a marked ballot in person to the early voting clerk’s office while the polls are open on election day.

Respectfully submitted,

/s/ Jared R. Woodfill

JARED R. WOODFILL

State Bar No. 00788715

Woodfill Law Firm, P.C.

3 Riverway, Suite 750

Houston, Texas 77056

P:(713) 751-3080

Fax: (713) 751-3058

woodfillservice@gmail.com

Counsel for Relators

CERTIFICATE OF SERVICE

By affixing my signature above, I , Jared Woodfill, hereby certify that a true and correct copy of the above Original Petition for Writ of Mandamus has been delivered via electronic mail to the parties below on the 23nd day of September, 2020.

/s/Jared Woodfill

Jared Woodfill

TRAP 52.3(J) CERTIFICATION

Pursuant to TRAP 52.3(j), the undersigned certifies that he has reviewed the above Petition for Writ of Mandamus and concluded that every factual statement in the petition is supported by competent evidence included in the appendix and or the record.

/s/ Jared Woodfill

Jared Woodfill

CERTIFICATE OF COMPLIANCE

I, Jared Woodfill, Counsel for Relators certify that this document was generated by a computer using Microsoft Word which indicates that the word count of this document is 4,350. The typeset is Times New Roman 14 pt for text.

/s/ Jared Woodfill

Jared Woodfill